

The Obligations of the Carrier

By Diego Esteban Chami*

1. Preface:

My subject today is “The Obligations of the Carrier”; more precisely Chapter 4 (articles 11 to 16). The length and the good draft of Chapter 4, which is not the case of all Chapters, make my speech very comfortable.

The Rotterdam Rules are meant to replace, on the one hand, the Hague-Visby Rules and, on the other, the Hamburg Rules. Therefore, it will be useful in this subject to compare the obligations of the carrier under the Rotterdam Rules with those of the Hague-Visby Rules and Hamburg Rules and I will do so when I consider it relevant.

2. Agenda:

I propose to you the following agenda

1. Introduction with some general comments.
2. Then I will analyze article 12 related to the period of responsibility of the carrier that has been extended.
3. I will continue with article 13, the specific obligations applicable to all modes of transport.
4. Then I will cover the FIO Clauses; we can say in advance that the Rotterdam Rules have taken the English approach and admitted the FIO clauses
5. I will comment on the obligations applicable to the voyage by sea: namely the seaworthiness
6. Conclusion: and finally we will sum up and reach some conclusions including the balance of the amendments

3. Introduction:

As an introduction, I would like to make the following general remarks:

- Importance

The obligations of the carrier are particularly important because they impose specific duties that will have to be fulfilled with the subsequent liability in case of default.

- Hague-Visby Rules as a model; differing from Hamburg Rules

The Rotterdam Rules follow the model of the Hague-Visby Rules when they impose specific and positive duties on the carrier such as, among others – to load, handle, stow, etc. the goods. The Rotterdam Rules differ from the Hamburg Rules, which implicitly involve the carrier’s obligations under the liability rules of article 5.1.

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- New duties as multimodal rules: receive - deliver goods

The Rotterdam Rules govern the “door to door” transport and what is already called “wet multimodal transport”, that is, multimodal transport as long as it includes a maritime leg. Therefore, they include obligations that are not found in the Hague-Visby Rules such as the duties to receive and to deliver the goods.

- Extension - period responsibility:

The Rotterdam Rules extend the period of liability of the carrier and that of application of the Rules from tackle to tackle to door to door

4. Article 12. Period of responsibility of the carrier

Two issues can be distinguished

1. The period of liability of the carrier, on the one hand, and on the other
2. the period of application of the rules

A) Under the Hague-Visby Rules, the period of liability differs from the period of application: the Rules applied only between loading and discharging, that is to say, from tackle to tackle (it’s during that period that the goods are subject to the typical risks of maritime transport) but the period of custody and liability of the carrier might begin before the loading operation and extend after the unloading.

That subdivision of the contract of carriage in three periods, the period prior to loading, the transport itself –the only one to which the Hague-Visby rules apply- and the period subsequent to the unloading was criticised by many, but I would like to mention a French professor, Francis Sauvage to whom this was a *“legal heresy”*.

B) The solution provided by the 1978 Hamburg Rules is different. It applies to the period during which the goods are under the carrier’s custody, throughout the voyage, and at the ports of loading and discharge.

C) Now, the Rotterdam Rules introduce a mayor modification when they extend the period of application of the Rules, which will govern from reception to delivery of the goods in a door to door solution.

I should add that now, under the Rotterdam Rules, the period of application of the rules coincides with the period of liability of the carrier.

4.1. Extension of the application of the Rules

The following slide shows the evolution of the period of application of the rules:

- The Hague Visby Rules apply only from tackle to tackle.
- The Hamburg Rules apply from port to port.
- The Rotterdam Rules will apply from “door to door”: the application period has been extended.

More precisely, the period of responsibility of the carrier begins when the carrier or a performing party receives goods for carriage and ends when goods are delivered including reception and delivery from or to an authority or other third party. Nevertheless, in a door to door transport, the period of liability of the carrier will include, for example, the time when the goods are under the custody of a port terminal that has received the goods for or after carriage.

4.2. Provisions of article 12.3:

The provision of article 12.3. might cause some problems, affecting the door to door concept of the rules. According to this article, the parties may agree on the time and location of receipt and delivery. However, in order to avoid any kind of abuse the clause is void to the extent that it provides that receipt is subsequent to the beginning of the initial loading; or delivery is prior to the final unloading.

5. Main obligations of the carrier: direct and indirect care of cargo

There are two ways of taking care of the cargo: the direct way of care of the cargo, namely to load, handle care for, etc. the goods, a duty that is imposed to all the period of liability of the carrier. The indirect care of the cargo is the seaworthiness, imposed only during the voyage by sea.

6. Direct care of cargo:

I will begin with the direct care of cargo. The first obligation of the carrier – to carry the goods to the place of destination - is found in article 1.1. that defines the contract of carriage. Then, article 11 imposes the obligation of carrying the goods to the place of destination, not to the port of destination, considering the door to door condition of the rules, and to deliver them to the consignee.

Article 13 considers the so called ‘specific’ obligations of the carrier. These are duties that affect every mode of transport: sea transport, as well as inland, and air transport, in case there was any. Article 13 includes the same seven obligations of Article 3, rule 2 of the Hague Visby rules.

These obligations are: to load, handle, stow, carry, keep, care for, and unload the goods, enforceable during the whole period of responsibility of the carrier, as stated in article 13.1.

However, as the Rotterdam Rules are a door to door convention, article 13 includes two new obligations of the carrier: the duties to receive the goods for transport and to deliver them to the consignee at destination. Therefore the unfulfillment of such obligations will be regulated by the Rotterdam Rules, entitling the carrier, for example, to oppose the exonerations of liability of article 17 and the time bar of article 62.

These two new obligations weren’t foreseen by the Hague-Visby Rules because they applied from the loading to the unloading.

We may say in advance that the Rotterdam Rules include the obligations to load, handle, stow and unload as optional admitting the FIO clauses.

6.1. According to article III, rule 2 of the Hague-Visby Rules the obligations to load, handle, etc. the goods must be carried out carefully and properly. The Rotterdam Rules share the same provision (article 12.1). The carrier will fulfill his duty of carefully and properly transport the cargo if he adopts a sound system taking into account the knowledge he has or should have had of the goods.

6.2. We should look for the terms of time and condition of delivery in other chapters. Moreover, Chapter 9 deals with the delivery of the goods, but that is not our subject.

The goods must be delivered on time to avoid delay (article 21). We should say that, according to article 21, delay only occurs when the goods are not delivered within the time agreed and at same condition of receipt to avoid liability (article 17). We should recall that the carrier is liable for loss, damage or delay occurred during the period of responsibility (article 17.1.).

6.3. Goods that become a danger:

6.3.1. The carrier is not obliged to receive or to load goods and he may decline to do so if the goods are or reasonably appear likely to become an actual danger to persons, property or the environment. He can also take other reasonable measures such as to unload, destroy or render the goods harmless.

6.3.2. At sea the carrier may sacrifice goods if this is reasonable made for common safety of the property involved (this would be a general average) or for preserving human life.

7. FIO Clauses:

Section section 13.2. allows the Carrier and shipper to agree that loading, handling, stowing or unloading is to be performed by the shipper, the documentary shipper or by the consignee. The FIO clauses (“free in and out”) have been incorporated into the Rotterdam Rules. The English approach by which those duties and the consequent liability *prima facie* rested on shipowners but it could be transferred by agreement to cargo interests has been adopted. This solution is not found in the text of the Hague-Visby Rules.

7.1. Formal requirements:

There are some formal requirements because the FIO clause must be referred to in the contract particulars. It seems that what should be referred to in the contract particulars is just the FIO clause and it is not necessary to state that the carrier is not liable, because this is stated in section 17.3.i).

The issue is not for the carrier to be released from his responsibility if he failed to perform an assumed duty, but for him not to have to assume the performance of such an obligation.

7.2. However, the rules about FIO and similar clauses pose some questions:

1. What about the clauses FIOST and FIOST_LS? Are these clauses that include lashing and securing the cargo on the holds, acceptable for the Rotterdam Rules?
2. I also wonder whether the carrier is not liable for the safety issues of those operations, for instance if the ship capsizes by the incorrect stowing operation carried out by a stevedore company appointed by the shipper;
3. I should say that the FIO clauses neither reduce the period of liability of the carrier nor the period of application of the rules:
4. As regards the rights of the consignee: can the FIO clause agreed between the carrier and the shipper be opposed to the consignee? It seems that the answer is yes if the clause is referred to in the contract particulars.
5. In relation to the possibility of abuse from the carrier: it does not seem to be the case.

8. Specific obligations applicable to the voyage by sea: the seaworthiness:

Let's move on to another main issue: the specific obligations applicable to the voyage by sea.

1. Under the Common Law the duty of the carrier to provide a seaworthy ship was an absolute duty ("Steel v (AND) The State Line SS" (1877)).
2. However, more than one hundred years ago, the Harter Act of 1893 shaped the obligation as a due diligence one.
3. Then, Art. III, rule 1, of the Hague Visby Rules imposed on the carrier to exercise due diligence stressing that this was only before and at the beginning of the voyage.
4. Then the doctrine of stages appeared: according to that doctrine, the duty was renewed in each scale but it was not adopted ("Leesh River Tea Co v British India Steam").

Now under the Rotterdam Rules things have changed and the carrier is bound at the beginning of and during the voyage by sea to exercise due diligence to make and keep the ship seaworthy. Therefore, the Rotterdam Rules bring a very important modification: the period of the obligation. Now the obligation is not only to make the vessel in a seaworthy condition at the beginning of the voyage by sea, but also to keep the vessel in that condition at sea.

I would like to mention that at the Diplomatic Conference held in October 1922, it was the Dutch delegate, Mr. van Slooten who proposed the replacement of the word: "make" for the word "maintain" making the obligation of the carrier continuous.

At that moment, the proposal was rejected arguing that it was not reasonable to impose on the shipowner the obligation of maintaining in a state of seaworthiness a ship that was on high sea. Now, under the Rotterdam Rules the Dutch position of Mr. Van Slooten has been adopted and the duty is continuous.

As regards the reasons for the extension they are: • Now there is a permanent communication between the vessel and the owner • The solution is consistent with ISM Code • Most important: allocation of risk on the carrier.

Seaworthiness may be defined as the state of a vessel in such condition, with such equipment, and manned by such master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage. This means the ship should have its own boat's hull and machinery, store rooms, main and auxiliary machines, power units, boilers, refrigeration, and further equipment of a proper ship, in good conditions as well as updated navigation charts, news for seafarers and crew, competent crew. The ship must be fit in design, structure, condition, and equipment to encounter the ordinary perils of the sea voyage.

The issue is not whether the carrier is able of fulfilling his duty during the voyage, but rather who should bear the risk. However, the assessment of the due diligence to keep the ship seaworthy during the voyage and when the ship is at sea, should be less strict than to make the ship seaworthy at port.

Even though it is a personal obligation the carrier may delegate his obligation to make and keep the vessel seaworthy but he can not delegate his liability as stated in the well known precedents of the Muncaster Castle first, and at the Amstelslot afterwards. Obviously, the carrier might have recovery actions against the shipyard, surveyor, classification society who has not performed the duties delegated by him.

9. Balance of the amendments:

Now that my presentation is coming to an end, I would like to sum up and make a balance of the amendments of the obligations of the carrier.

9.1. The period of responsibility has been extended from tackle to tackle to door to door:

Now, under the Rotterdam Rules, the period of application coincides with the period of liability of the carrier.

9.2. Obligations imposed from reception to delivery:

The carrier 's duties of direct care of the cargo are enforceable not only from the loading up to the unloading as in the Hague-Visby Rules, but also from the reception up to the delivery, what means an extension of the carrier's liability period.

9.3. Hague-Visby Rules are taken as a model:

Therefore, and this is very important, the Courts rulings under the Hague Visby Rules will still be in force under the Rotterdam Rules.

9.4. Two new legal duties: to receive and deliver the goods

As a wet multimodal convention, two new obligations are imposed as well: the one of receiving and the one of delivering the cargo, which had not been explicitly included in the Hague-Visby Rules.

9.5. FIO Clauses:

The FIO clauses have been admitted by law and the acceptance of the FIO clauses and similar ones, which means a fair and reasonable solution favouring the carrier.

9.6. Seaworthiness as a due diligence duty:

Seaworthiness still as due diligence duty, this would be what in French is "obligation de moyen" and in Spanish "obligación de medio".

9.7. Continuous obligation:

But the seaworthiness obligation has been extended including not only to make but also to keep the vessel in seaworthy conditions.

9.8. Balance:

And therefore, in relation to the obligations of the carrier, the balance of the risk has moved slightly in favour of the cargo.

10. Final words:

In two more days you will be part of a historical moment in which delegates from different countries will sign the convention that with the name of Rotterdam Rules will replace the regulations that have been in force for almost 80 years now ruling the carriage of goods by sea: the Hague Visby Rules.

Next Wednesday many years of hard work will be crowned with the signing ceremony, and that 23rd of September will be remembered as a milestone in maritime law.

Good luck to you all and congratulations on the hard work done by CMI and by UNCITRAL.

Thank you very much for your attention.

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